(3)

Supreme Court, U.S.
FILED
AUG 19 1998
OFFICE OF THE CLERK

No. 97-2061

In the

Supreme Court of the United States

October Term, 1997

RICHARDSON C. BELL, Trustee for Bell Land Trust
Petitioner,

v.

CITY OF VIRGINIA BEACH,
Respondent.

On Petition for Writ of Certiorari to Supreme Court of Virginia

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

PATRICK A. GENZLER
Vandeventer Black, LLP
500 World Trade Center
Norfolk, VA 23510
Telephone: (757) 446-8631
Facsimile: (757) 446-8670

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Petitioner

12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

INTRODUCTION 1

I. THIS COURT HAS JURISDICTION OVER THE TAKINGS ISSUE 1

A. The Takings Issue Was Properly Raised Below 1

B. It Is Appropriate to Raise a New Legal Theory or, in Fact, "Any Argument Petitioner Likes" in Support of a Properly Pled Cause of Action 2

II. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE, AMONG OTHER REASONS, THE COURT BELOW MISINTERPRETED THE TAKINGS CLAUSE IN A MANNER THAT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE JURISDICTIONS 4

III. THAT DAVID LUCAS' PROPERTY WAS MORE VALUABLE THAN THE BELL'S IS UNINTERESTING AND IRRELEVANT 6

IV. BELL'S TAKINGS CLAIM IS RIPE 7

CONCLUSION 8

TABLE OF AUTHORITIES CITED

Page

Cases

Beck v. Washington, 369 U.S. 541 (1962) 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 1-2, 4-5

Ross v. Moffitt, 417 U.S. 600 (1974) 5

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 7-8

Yee v. City of Escondido, 503 U.S. 519 (1992) 3

Richardson C. Bell, Trustee for the Bell Land Trust (Bell), respectfully files this reply to the City of Virginia Beach's opposition to Bell's petition for writ of certiorari.

INTRODUCTION

Respondent, the City of Virginia Beach (City), has filed an opposition to Bell's petition for a writ of certiorari that (1) attempts to deny that Bell raised a regulatory takings claim in the courts below that would allow Bell to elaborate in his petition on the theory of regulatory takings, (2) suggests that the court below merely applied a correctly stated rule of law, (3) argues that *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), can be distinguished because David Lucas' lots were more valuable, and (4) claims that there is no conflict with other jurisdictions because Bell's takings claims were brought in the wrong forum in Virginia. While the weakness of these arguments is self-evident, several points merit this reply.

I

THIS COURT HAS JURISDICTION OVER THE TAKINGS ISSUE

A. The Takings Issue Was Properly Raised Below

This is a regulatory takings case. This case has always been a regulatory takings case. From the filing of the complaint through the appeal to the Virginia Supreme Court Bell has alleged and has argued that the application of Virginia Beach's dune regulation to the Bell Trust's property has taken that property without the payment of just compensation. Yet the City suggests that, in the court below, Bell "argued only that he as trustee and he and his wife as former owners were essentially the same entity as the predecessor corporate—owner because Bell had been a shareholder of that corporation." Respondent's Brief in Opposition at 6 (citing Bell's Brief of Appellee to the Virginia Supreme Court at 17).

How can this be? How can Bell have argued "only" about ownership issues when, after dispensing with certain procedural issues, Bell titles the first substantive argument to the Virginia Supreme Court this way: "The City's denial of a permit under the Coastal Primary Sand Dune Zoning Ordinance was a regulatory taking of Bell's property since it deprived him of all economically beneficial use of his property." Appellee's Brief at 14. How can Bell have not argued the takings issue when the next subheading suggests: "The denial of a Dune Ordinance permit by the City's Wetlands Board was a categorical taking." *Id.* at 15. How can Bell have waived the takings issue when he proceeds to discuss the applicability of this Court's decision in *Lucas v. South Carolina Coastal Commission*, 505 U.S. at 1019? Appellee's Brief at 15-16. How can it be improper to discuss takings theory now when Bell discussed below the alleged so-called "harmful or noxious uses" exception to the Takings Clause and Bell's "reasonable expectations" that the Trust could use the lot for residential development? *Id.* at 16.

How can the City pretend to be caught somehow unaware of the takings issue when its brief to the Virginia Supreme Court devotes eight pages to refuting the trial court's determination that there had been a regulatory taking? Brief of Appellant to the Virginia Supreme Court at 12-20. Finally, the court below devoted virtually its entire opinion to the subject of regulatory takings? *See* Petitioner's Appendix A, *passim*.

The City's argument invites astonishment. However, a review of the record will quickly dispel any vestiges of credibility that the City's argument may retain.

B. It Is Appropriate to Raise a New Legal Theory or, in Fact, "Any Argument Petitioner Likes" in Support of a Properly Pled Cause of Action

The City also suggests that Bell should be confined in his petition to raising only the same arguments that were made below in support of his takings claim. Respondent's Brief in

Opposition at 5. The City points out, correctly, that the petition elaborates on regulatory takings theory in more detail than Bell utilized below. *Id.* at 5-6. The City argues that this is improper, citing to *Yee v. City of Escondido*, 503 U.S. 519 (1992), for the proposition that this Court will not consider claims neither raised nor addressed below. The City apparently ignores the distinction in *Yee* between "claims" and "arguments" in support of claims.

The problem in *Yee* was that Yee attempted to raise a ***regulatory taking claim*** at the merits stage when such a claim was not part of the questions presented. *Yee*, 505 U.S. at 520. At the time this Court granted review the only taking issue that was properly before it was the claim for a ***physical invasion***. *Id.* at 520-21. This Court was not willing to entertain the entirely new regulatory taking claim on the merits stage that was not found in the questions presented.

This case, however, bears none of the baggage of *Yee*. Apart from the fact that we are only at the petition stage at this point, the regulatory takings claim at issue in this petition has been the central theme of this case since the day the complaint was filed. The claim is quite properly in the questions presented. And, because all of Bell's legal analysis in his petition is in support of this very same ***claim***, Bell's regulatory takings arguments are entirely appropriate at the petition stage. As this Court said in *Yee*, referring to arguments at the merits stage,

> once petitioners properly raised a taking claim, they could have formulated, in this Court, any argument they liked in support of that claim.

Id. at 520. In order to demonstrate the conflicts that exist between the decision of the Virginia Supreme Court and other appellate jurisdictions, Bell quite naturally elaborated on the meaning of a regulatory taking. To suggest, instead, that this elaboration constituted a new set of "claims" or that Bell must be

confined to making the same precise arguments made below is not credible.[1]

II

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE, AMONG OTHER REASONS, THE COURT BELOW MISINTERPRETED THE TAKINGS CLAUSE IN A MANNER THAT IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER APPELLATE JURISDICTIONS

The City suggests that Bell's petition is simply about an alleged "misapplication of a properly stated rule of law" that does not warrant review under this Court's Rule 10. Respondent's Brief in Opposition at 6. To support this argument, the City proceeds to quote three sentences from the Virginia Supreme Court's decision below that focus on *Lucas*. *Id.* at 6-7. The City next says that the court below merely applied its understanding of *Lucas* that is embodied in these three sentences and that this Court should therefore deny Bell's petition. *Id.* at 7. The City's logic is elusive. Perhaps the City is suggesting that three sentences of reasonably correct analysis somehow insulate from review every other legal error in the opinion—even when those errors are in conflict with opinions of this and other

---

[1] The City also cites to *Beck v. Washington*, 369 U.S. 541, 549-53 (1962), in support of its argument that this Court will not consider new claims. Respondent's Brief in Opposition at 5 n.9. *Beck* involved a constitutional attack on a criminal statute that was not properly raised at the trial court level or in the "assignments of error" at the appellate level in accordance with Washington State procedures. *Id.* at 551-52. With the constitutional claims not properly before or addressed by the Washington appellate court, they were not properly before this Court. *Id.* at 553. Nor were they found in the questions presented in the Petition for Writ of Certiorari. *Id.* at 554. None of this has the slightest resemblance or relevance to Bell's case.

courts. Perhaps the City is suggesting that the entire opinion revolves around these three sentences and that there are no other legal conclusions, erroneous or otherwise, in the opinion. In either case, the City is wrong.

Bell's petition asks, among other things, whether a city can avoid the obligation under the Takings Clause to pay just compensation merely because a property owner acquired a parcel of real property after the enactment of an ordinance whose subsequent application deprived that parcel of all economically viable use. The Virginia Supreme Court essentially said "yes" and held that "a subsequent regulation directly affected the property owner's 'bundle of rights' which, at the time of their purchase, included the right to develop their property freely." Petitioner's Appendix at A-6. This holding of the Virginia Supreme Court is not a mere application of *Lucas*. It is a unique rule of law created by the Virginia court. The Virginia Supreme Court first announced a rule of law and then applied the holding in *Lucas* to that rule of law. It is the rule of law announced by the state court that is presented for review, not the application of the *Lucas* decision to that rule of law. It is, as explained in Bell's petition, a rule of law that is in conflict with the United States Constitution, the holdings of this Court, and the holdings of numerous other appellate courts. That the Virginia court thought that *Lucas* is compatible with its erroneous rule of law does not make it so. The decision below is not a simple and unreviewable application of *Lucas*. It is a serious misinterpretation of the Constitution and the holdings of this Court. As explained in Bell's petition, it is in serious conflict with the holdings of many other appellate jurisdictions. It is reviewable by this Court.[2]

---

[2] The City's citation to *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), is equally unavailing. *Ross* concerned whether a criminal defendant must be provided appointed counsel for assistance in preparing a petition for certiorari to this Court. One sentence of the opinion is

(continued...)

III

THAT DAVID LUCAS' PROPERTY WAS MORE VALUABLE THAN THE BELL'S IS UNINTERESTING AND IRRELEVANT

The City notes that David Lucas paid $975,000 for his two lots and claims that a predecessor to the Bells obtained two lots for $3,333. Respondent's Brief in Opposition at 8.[3] The city also suggests that there is some relevance to the fact that Lucas' lots were "ready to build" and Bell's supposedly were not. *Id.* at 8. Without citation to an inexpensive lot exception to the Takings Clause, the relevance of this passage is enigmatic at best.

Without citation, the City also claims that Bell's lots "were not developable before the dune act." *Id.* But that was never the holding of the Virginia Marine Resources Commission (the state administrative agency that denied Bell's appeal of its permit application denial), the trial court, or the Virginia Supreme Court.[4] And, of course, the City neglects to mention that there had been a home on the property in 1975. State's Appellate Appendix at 88. Although it was never as grand as David

---

[2] (...continued)
arguably relevant when this Court said that its review "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Id.* at 617. This is quite unremarkable and quite unhelpful in the case of Bell's petition as that petition addresses much more than the "correctness of the judgment."

[3] For what it's worth, the City also admits that these and other lots were acquired for $10,000 in 1979. *Id.* at 2.

[4] In fact, the uncontroverted testimony at trial was that other lots identically situated to Bell's had been developed before and after Bell's acquisition (Virginia Supreme Court Appendix (App.) at 15-16, 18, 20, 23-24, 106-08) and that the lots were buildable (App. at 68-69, 111-14).

Lucas' land. Bell had a valuable property interest and every reasonable expectation to be able to replace the home that had been removed four years before Bell's predecessor purchased the land.

IV

BELL'S TAKINGS CLAIM IS RIPE

The City's final argument recites the fact that Bell properly exhausted all administrative procedures in appealing the denial of his permit application. As the City so succinctly says: "All of the provisions of that Act were followed, resulting in a final judicial review and decision affirming the regulatory action and the denial of the permit." Respondent's Brief in Opposition at 9. The City argues that Bell was in error in filing a subsequent takings claim in trial court; that Bell should have filed that action as part of the appeal of the administrative decision. *Id.*

The question of whether Bell filed his taking claim in the proper state court is a matter involving an interpretation of Virginia's rules of procedure; it is not a federal question. In any event, the City made virtually the identical argument to the Virginia Supreme Court when it claimed that the trial court was without jurisdiction because the decision of the Virginia Marine Resources Commission and the circuit court (that heard the appeal of the permit denial) was res judicata on all issues—including the takings claims. Brief of Appellant before the Virginia Supreme Court at 9-12. The Virginia Supreme Court, however, decided that it did not need to address this contention. Appellant's Appendix at A-10, n. 11. Because the City did not frame this issue as a federal question in a cross-petition, neither should this Court.

In fact, the only significance of the fact that Bell obtained "final judicial review" of the permit denial is that this makes it clear that Bell "obtained a final decision regarding the application of the regulations to the property at issue" as required by

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).[5]

CONCLUSION

Perhaps the City recognizes that as a matter of statistics this Court grants few petitions for writ of certiorari and therefore the City need not take Bell's petition very seriously. Bell, however, takes it very seriously. Bell has been denied the right to make any reasonable use of two valuable lots on the Chesapeake Bay. The trial court found that there had been a taking and awarded damages. The Virginia Supreme Court reversed because the property had been acquired after the dune regulations were enacted. The court failed to recognize that it was the application of the regulation that led to the taking, not their mere passage. As Bell's petition explains, the appellate courts of numerous state and federal jurisdictions are in conflict with the Virginia Supreme Court's decision and with each other. There is no prevailing theory on how courts should approach as-applied regulatory takings when the regulation is applied after regulated property is acquired. If other jurisdictions, however, look to Virginia (and New York) for guidance, then landowners across the Nation will lose completely the constitutionally guaranteed right of just compensation.

Nothing that the City has said diminishes in any way the force of Bell's arguments or the conflicts created by the decision below.

---

[5] In fact, by exhausting all administrative decisions and even obtaining judicial review of the agency action, Bell arguably did more than obtain a final agency decision required under *Williamson County*.

For these reasons, Bell's petition for writ of certiorari should be granted.

DATED: August, 1998.

Respectfully submitted,

PATRICK A. GENZLER
Vandeventer Black, LLP
500 World Trade Center
Norfolk, VA 23510
Telephone: (757) 446-8631
Facsimile: (757) 446-8670

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Petitioner